SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

SUPREME COURT, U. S.
FILED
MAY 26 1972

No. 71-1262

SAM A. HERSCOVITZ,

Petitioner,

v.

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

BRIEF OF BOARD OF COMMISSIONERS OF THE UTAH STATE BAR IN OPPOSITION

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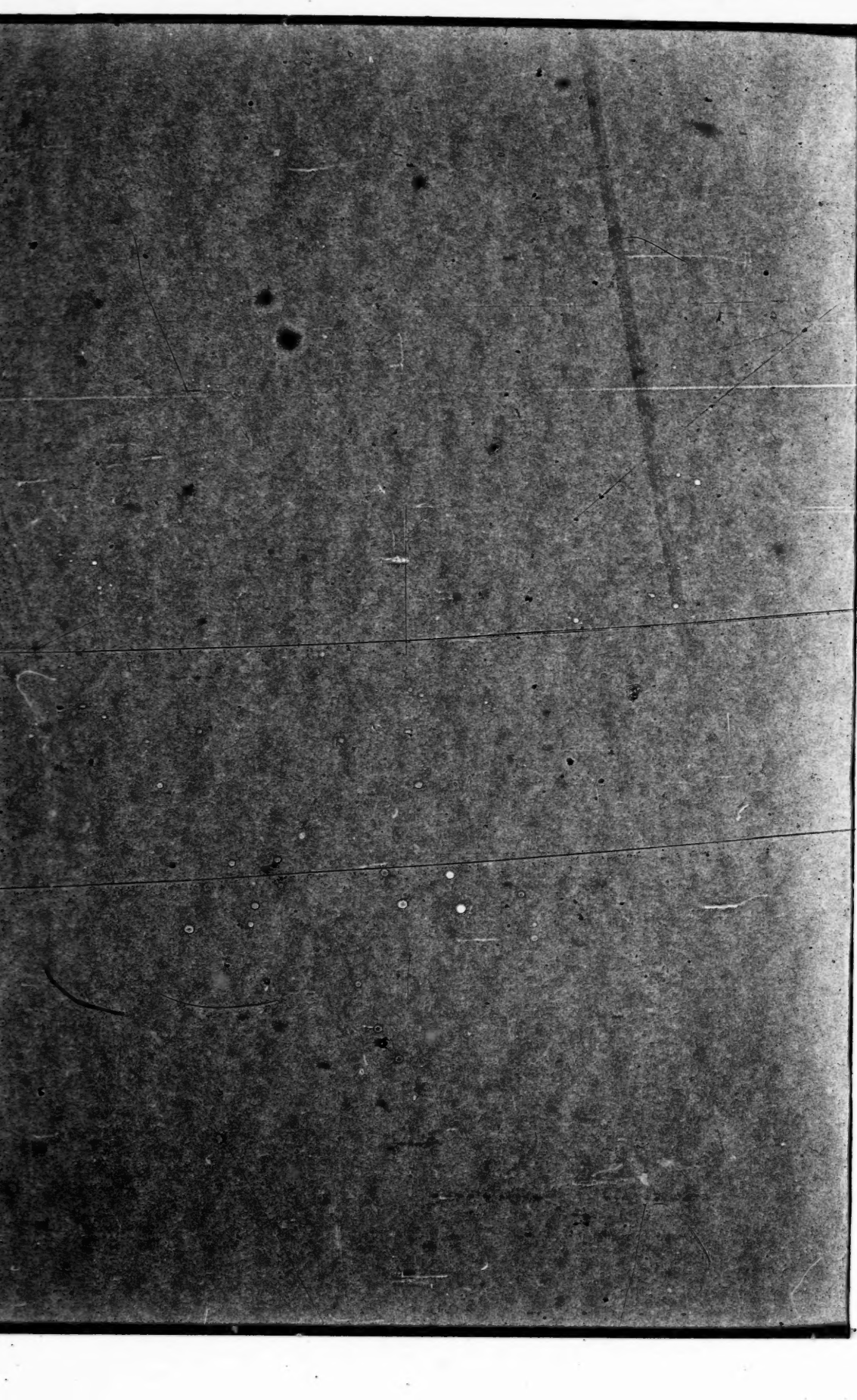

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
POINT I	
THERE IS NO BASIS FOR GRANTING THIS PETITION BECAUSE THE DECISIONS BELOW DO NOT CONFLICT WITH THOSE OF ANY OTHER COURT AND RAISES NO SUBSTANTIAL FEDERAL QUESTIONS	7
POINT II	
THIS COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI TO CONSIDER FEDERAL CONSTITUTIONAL ISSUES RAISED FOR THE FIRST TIME IN A PETITON FOR CERTORARI FROM A STATE COURT DECISION	10
POINT III	
PETITIONER WAS ACCORDED SUBSTANTIVE DUE PROCESS	13
POINT IV	
THERE IS NO EVIDENCE OF DISCRIMINATION	16
CONCLUSION	17
APPENDIX	
I	19

TABLE OF CONTENTS (Continued)

Page

TABLE OF AUTHORITIES

CASES CITED

California v. Taylor,
353 U.S. 553 (1957) 11

Cardinale v. Louisiana,
394 U.S. 437, 438 (1969) 11

Crowell v. Randell,
35 U.S. (10 Pet.) 368, 9 L Ed. 458 (1836) 11

Konigsberg v. State Bar,
353 U.S. 252 (1957) 9

Lear v. Adkins,
395 U.S. 653 (1969) 11

NLRB v. Pittsburgh S.S. Co.,
340 U.S. 498, 502 (1951) 7

Papachristou v. City of Jacksonville,
..... U.S. ....., 40 L.W. 4216, (1972) 9

Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.,
360 U.S. 334, 342, n. 7 (1959) 11

Schware vs. Board of Bar Examiners,
353 U.S. 233 (1957) 10

State Farm Mutual Automobile Ins. Co. v. Duel,
324 U.S. 154 (1945) 11

Terminiello v. Chicago, 337 U.S. 1 (1949) 11

Tyrell v. District of Columbia, 243 U.S. 1 (1916) 11

Willner v. Committee on Character and Fitness,
373 U.S. 96 (1963) 7

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OPINIONS BELOW

The Supreme Court of Utah did not render a written opinion. It entered an order denying Petitioner's petition for a writ of mandamus on February 1, 1971, a copy of which order is attached to Petitioner's Brief as Appendix D. On November 5, 1971, the Supreme Court of Utah denied Petitioner's request for a rehearing (see Appendix E of Petitioner's Brief). The findings and conclusions of the Board of Commissioners of the Utah State Bar are set forth in Appendix A of Petitioner's Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court should reverse the decisions of the Supreme Court of Utah and the Board of Commissioners of the Utah State Bar, denying Petitioner the right to sit for a fourth bar examination (having failed three times before), when those decisions were rendered after a plenary hearing and where there has been no showing by Petitioner that those decisions were in any way based upon improper evidence.

2. Whether this Court should review a case heard and decided initially by the Board of Bar Commissioners for the State of Utah merely because Petitioner disagrees with the findings of said Board as upheld by the Supreme Court of Utah.

3. Whether this Court will invalidate one of the rules of the Supreme Court of Utah when the Petitioner admittedly did not first question the validity of that rule during the proceedings below but instead raised this point for the first time in his Petition for Certiorari.

REGULATIONS INVOLVED

In addition to Rule IX, Supreme Court of Utah Rules cited by Petitioner in his Petition, and set out in Appendix F of the Petition, Rule X, Section 10-3, is also pertinent to this proceeding. It provides that any applicant who fails to pass the third examination will be re-examined only by special permission of the Board.

It is set out in full in Appendix I, hereof.

STATEMENT OF THE CASE

This case comes to this Court following the refusal of the Supreme Court of Utah to issue a writ of mandamus compelling the Respondent Board of Bar Commissioners of the State of Utah to permit the Petitioner to sit for a fourth bar examination.

Because of the numerous omissions and the several misleading statements evident in Petitioner's Statement of the Case, it is necessary for Respondent to set forth a complete statement of the background of this controversy.

1. *Petitioner's Bar Examination Failures*:

Petitioner graduated from the University of Utah Law School in 1937. Having been certified, he took the bar examination that year but failed. The next year he again sat for the examination and failed.

In 1967, after continuing his work as a furniture salesman and store manager, which he had pursued for approximately thirty years, he again applied for permission to sit for the bar examination, asserting that he had in the preceding year audited classes at the University of Utah Law School, taken the Bar Review Course, and studied in the various available law libraries located in his area. (Application for Bar Examination February, 1968). Respondent granted permission to sit for that examination; however, Petitioner again failed.

In 1969 Petitioner applied for permission to sit for a fourth examination which was to be given in February 1970. On July 8, 1969, Respondent advised Petitioner that he would not be permitted to take the examination a fourth time because he had not made a sufficient showing for special consideration (R. 20).

Petitioner nevertheless filed a formal request in December 1969, and on January 29, 1970, was advised that Respondent was "not prepared to certify that you are of good moral character and general fitness to practice law in the State of Utah" (R. 21). Petitioner was further advised at that time that Respondent had "reserved decision on whether you should be permitted, in any event, to take a further Bar Examination in view of the provisions of Section 10-3 of Rule X, since you have heretofore taken the examination three times and failed" (R. 21).[1]

2. *The Hearing Below*:

Pursuant to Petitioner's request (R. 22) a hearing was scheduled by Respondent to afford Petitioner an opportunity "to examine and cross-examine witnesses to adduce evidence bearing on the matters adverse to you and upon your moral character and general fitness to practice law" (R. 23). Petitioner was further informed by Respondent at that time that he could use the subpoena powers of Respondent if he desired. Respondent also stated to Petitioner that he had been refused permission to sit for a fourth examination on the basis of "bad reputation and unethical business practice and upon the adverse statements" of four named individuals (R. 23).

A hearing was conducted before Respondent on February 12 and 14, 1970. Petitioner was represented by two attorneys at that time and presented eight witnesses on his behalf. Five other witnesses testified against Petitioner and were cross-examined by Petitioner's attorneys. A complete transcript was made of the hearing.

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[1] Despite "the plethora of miscellaneous minutiae" presented in Petitioner's Brief, the Brief conveniently omitted noting the fact that Petitioner failed the examination three times.

3. *Respondent's Findings and Conclusions*:

On March 13, 1970, Respondent issued its findings and concluded that Petitioner "failed to establish that he is possessed of that moral character and entitled to the high regard of the public sufficient to be recommended for admission to practice law in the State of Utah" (R. 28).

On March 25, 1970, by his attorney, Petitioner filed exceptions to the findings (R. 30-35) and on April 17, 1970, the findings were affirmed with the following amendment:

> In view of the foregoing Findings and Conclusions, the further question whether Applicant should be allowed to sit for a fourth examination is moot and no determination thereof is made (R. 36).

4. *The Appeal and the Petition for Mandamus*:

On April 12, 1970, prior to the ruling by Respondent on the exceptions taken to its findings, Petitioner by his attorney, filed a notice of appeal to the Supreme Court of Utah.

On September 10, 1970, Petitioner by his attorney filed an Affidavit and Petition for Writ of Mandamus. Also, at that time, Petitioner by his attorney, made a motion to strike certain letters and documents submitted by Respondent to the Supreme Court because they were "incompetent as evidence for all of the reasons set forth hereinabove, as well as being redundant and irrelevant."

Briefs were filed by both parties and on December 7, 1970, the Supreme Court of Utah made the following ruling:

> This day the Court agreed to proceed with the review of this matter on the basis of the petition for extraordinary writ; and the motion to strike the exhibits is denied subject to respective counsel making whatever

> argument they want concerning the evidence in the record. The matter is to be submitted on the basis of the record and on the briefs heretofore filed. Respective counsel may file further briefs if they so desire.

A further brief was filed by Petitioner on January 27, 1971, and on February 1, 1971, the Supreme Court of Utah denied the petition for the writ.

SUMMARY OF ARGUMENT

There is no basis for granting this Petition: the decision below is not in conflict with any prior decision of this Court or any other court; this case involves a peculiar set of facts and as such contains no principles the settlement of which is of importance to the public. Petitioner was granted due process. The record is clear that Respondent's and the Utah Supreme Court's determinations were based upon material properly in evidence.

This Court cannot review through a Petition such as this the Rules of a State Supreme Court when no attempt was made in the proceedings below to challenge such Rules.

Petitioner's own Brief, together with evidence not reflected therein, shows that the decisions below do not violate due process.

ARGUMENT

POINT I.

THERE IS NO BASIS FOR GRANTING THIS PETITION BECAUSE THE DECISIONS BELOW DO NOT CONFLICT WITH THOSE OF ANY OTHER COURT AND RAISES NO SUBSTANTIAL FEDERAL QUESTIONS.

A. *No Conflict of Decisions*:

The reasons for which Certiorari may be granted were restated by this Court in *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951):

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a *real and embarrassing conflict of opinion and authority* between the circuit courts of appeal." [Citations omitted; emphasis added.]

See also Supreme Court Rule 19 (1) (b).

In this present case, it could hardly be said that the decisions below denying mandamus and the right to sit for a fourth bar examination gives rise to a real and embarrassing conflict of opinion and authority with any existing case.

The case of *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), cited by Petitioner as conflicting with the decisions below, is clearly distinguishable. In that situation, in marked contrast to the present case, this Court noted (at 373 U.S. 99):

> New York does not appear to have any procedure whereby an applicant for admission to the Bar is served with an Order to Show Cause by the Appellate Division before he is denied admission nor any other procedure that gives him a hearing prior to the Court's adverse action.

Not only does Utah have such a procedure, but it was carefully followed in this instance with notice, representation by counsel, cross-examination, a transcript, and a right to appeal.

To further distinguish *Willner,* it should also be noted that Mr. Willner had actually passed the New York Bar Examination, whereas the Petitioner herein had three times failed the Utah Bar examination.

Finally, Respondent's determination does not conflict with *Willner* because this Court ruled there that the New York Appellate Division's determination was based upon ex parte reports (373 U.S. at 106). In this case, however, the record is clear that the determinations below were made only on the basis of the evidence properly in the record. See the transcript of the hearing where Respondent members stated (Transcript of Hearing, pp. 123-24):

> [Member Neilsen:] It is my understanding that this Commission is here for the purpose of hearing evidence, and *its decision will be made upon the evidence that it hears . . . The Commission doesn't have any information as far as I am concerned upon which it intends to rely in any manner outside of what is being presented at this hearing.*
>
> * * * *
>
> [Member Bossard (President of the Utah State Bar):] [A]nything that the Board is going to use to make its decision on, you would have a right to have that information, and you would be given that privilege.
>
> [Emphasis added.]

In its ruling on the motion to strike exhibits, the Supreme Court of Utah stated in part:

> The matter is to be submitted *on the basis of the record,* and on the briefs heretofore filed. Respective

counsel may file further briefs if they so desire. [Emphasis added.]

In the proceeding below, the determinations were made on the basis of the record, not extraneous documents. Petitioner has made no contrary showing.[2]

The only other case cited by petitioner as conflicting with the decisions below is *Papachristou v. City of Jacksonville,* ..... U.S. ....., 40 L.W. 4216, (1972). That case also is distinguishable from the present situation. It involved a criminal conviction under the Jacksonville vagrancy ordinance and had nothing to do with a proceeding such as presented here. This Court stated (at 42240): "Arresting a person on suspicion . . . is foreign to our system." Respondent does not take issue with this ruling, but respectfully points out that an arrest for suspicion of vagrancy is vastly different from an application for admission to practice law.

The Court has recognized this difference in numerous ways. For example, in a criminal case the burden of proof rests on the state; in a proceeding such as presented here, however, the burden of proving qualification rests on the Petitioner. *Konigsberg v. State Bar,* 353 U.S. 252 (1957).

Thus, *Papachristou* does not pose any conflict with the present case.

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[2] Petitioner has not shown that the questioned documents submitted by Respondent were in any way relied upon in making the determination below. There is substantial evidence in the record supporting that determination wholly apart from the questioned documents. In addition, the subject matter of the questioned documents was discussed at the hearing. It appears that the Executive Secretary of the State Bar simply submitted his entire file to the Supreme Court. This may have occurred because of the unclear designation of the record by Petitioner. It should be noted in passing that the Supreme Court of Utah heard this case as a petition for an extraordinary writ (mandamus) and not as a simple appeal. It is not conceded that the Supreme Court of Utah did not have the right, given these circumstances to review the entire file of Petitioner.

B. *No Substantial Questions*:

Petitioner has gone to the extreme in his attempt to make a case involving constitutional questions out of the facts in this matter. This court has not heretofore accepted petitions such as here presented to review the merits of lower court decisions solely because a party disagreed with the lower Court's determinations.

The only issue in this case is whether this Court should grant review to a Petitioner who, after a plenary hearing, is found by a State Bar Commission to be unfit to practice based upon evidence of a bad reputation and a lack of ethics in his business dealings.

The issue in this case is thus narrow, indeed. Only the Petitioner is affected. There are no sweeping problems such as presented in the *Willner* case, *supra,* or in *Schware vs. Board of Bar Examiners,* 353 U.S. 233 (1957), or in *Konigsberg, supra.*

This case was decided on the interpretation of the particular evidentiary facts presented. No constitutional principle was involved or presented to the Court below. Certiorari should not be granted.

POINT II

THIS COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI TO CONSIDER FEDERAL CONSTITUTIONAL ISSUES RAISED FOR THE FIRST TIME TIME IN A PETITION FOR CERTIORARI FROM A STATE COURT DECISION.

Petitioner claims, in his Petition to this Court, at page 29, that Rule IX, Revised Rules of the Utah State Bar for admission to the Bar, is unconstitutional and void for reasons of vagueness.

This issue was never raised in the proceedings below. It has been long established that this Court will not decide federal constitutional issues raised for the first time in this Court on review of state court decisions. *Crowell v. Randell,* 35 U.S. (10 Pet.) 368, 9 L. Ed. 458 (1836). This Court has consistently followed the *Crowell* rule. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.,* 360 U.S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154, (1945).[3]

There is no distinguishing reason why this case should be handled any differently from principles previously enunciated by this Court. There is good reason why this Court should *not* review the issue untimely raised since the Supreme Court of Utah should certainly be granted the first opportunity to review a challenge to its own rules.

As pointed out in the *Cardinale* case, *supra,* at page 400, of the report thereof, there are valid reasons for requiring that a question first be considered by the lower court before being considered on review by this Court: (1) the record on those questions is very likely to be inadequate; (2) in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality; and (3) the issue may be blocked by an adequate state ground.

As authority for his position that this new issue should be ruled upon by this court even though it has not been passed upon by a lower court, Petitioner cites the case of *Terminiello v.*

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[3] *Tyrrell v. District of Columbia,* 243 U.S. 1 (1916); *Lear v. Adkins,* 395 U.S. 653 (1969). This Court will not consider any issue which has not been briefed or orally argued below. (*California v. Taylor,* 353 U.S. 553 (1957)).

Chicago, 337 U.S. 1 (1949). We deem that case not in point. In *Terminiello* a city ordinance was attacked as being unconstitutional. The lower court's interpretation of the ordinance via an instruction to the jury was not objected to. It was agreed that since there was no objection to the instruction, the issue of the constitutionality of the ordinance was not contested and could not come before the Supreme Court. This Court, however, held that the fact that the parties did not object to the instruction was not controlling under the specific facts of *Terminiello* since the record made it clear that *petitioner at all times challenged the constitutionality of the disputed ordinance* under any construction thereof which would make his acts in violation of it.

In the present case this Petitioner did not in any manner raise the issue of the constitutionality of the above described Rule IX. The first mention of or reference to that issue, either directly or indirectly, occurred in the Petition to this Court. We submit that this issue, in light of the decisions above cited, should not be considered in determining whether Certiorari should be granted.

Finally, it should be noted that the position adopted by Petitioner with regard to Rule IX in his scramble to attract the attention of this Court is diametrically opposed to the position he adopted before the Supreme Court of Utah on the same Rule. Here, Petitioner claims Rule IX is "void for vagueness." Before the Supreme Court of Utah Petitioner referred to the "clarity" of the rule. (Argument filed by Petitioner on September 10, 1970, in support of Petition for Mandamus, p. 8).

POINT III

PETITIONER WAS ACCORDED SUBSTANTIVE DUE PROCESS.

The record below reveals that Petitioner was accorded substantive due process and that the findings and conclusions of Respondent were based upon substantial evidence. Petitioner has not made any showing that Respondent abused its power and authority or in any way acted capriciously. To the contrary, Petitioner's Brief to this Court reveals the justification and bases for Respondent's determination.

Petitioner's Brief does not deny the major findings of Respondent. Indeed, it merely attempts to "explain" them and to seek to have this Court become involved in the process of reconstruing evidence. No less than six pages of Petitioner's Brief are consumed with an ingenious attempt to explain away Petitioner's involvement in questionable transactions. Petitioner seeks to place the blame upon such factors as counsel, the certified public accountant and dishonored post-dated checks on which Petitioner merely missed his guess as to cash flow. He seeks to excuse the transfer of assets totaling $169,330.37 (in large part to his wife without consideration) during a period when the business in which he was involved was experiencing financial collapse, because no creditor was shown to have suffered thereby. However, he gives no reason for the suspicious transfer even though its timing and circumstances raise grave questions as to his intent.

In the same vein, Petitioner's Brief seeks to justify some of his dealings by asserting and reasserting several times that he has never yet been criminally convicted for any of his actions. Certainly, good moral character and fitness to practice law involves more than a lack of criminal convictions. Good moral

character and fitness to practice law are comprised of such qualities as trustworthiness — a quality which the evidence revealed Petitioner lacked.

One example of the several brought to light at the hearing demonstrating Petitioner's questionable ethics and lack of trustworthiness was the situation involving the dishonored stipulation which was discussed at great length on the record. In summary, Petitioner (after much discussion and with the advice of counsel and in his presence) executed a stipulation (prepared by his counsel) promising to pay a substantial sum of money in an attempt to resolve litigation against him (Transcript 241). Petitioner then refused to honor his commitment, embarrassing his first attorney to the extent that he withdrew from the case (Transcript, 243). When the matter was presented to the Court, Petitioner did not assert any legal or moral ground for setting aside the stipulation. After the lower court ruled against Petitioner, he then appealed to the Supreme Court of Utah which upheld the lower Court's ruling (Transcript, 244). Petitioner, therefore, eventually was compelled to honor his commitment, but only after much delay and cost and on order of the Supreme Court of Utah.

The attorney involved in this litigation against Petitioner was Alvin I. Smith, a member of the Utah Bar in good standing for thirty-five years. He testified against Petitioner at the hearing, and, unlike the other attorneys who had furnished endorsements for Petitioner, Mr. Smith had actually dealt with Petitioner in litigation, which was based upon Petitioner's questionable business actions. When asked whether Petitioner was qualified morally and legally and otherwise to practice law, Mr. Smith replied (at Transcript, 266):

> My opinion, I would never enter into a stipulation with this man [Petitioner] if he were ever admitted unless

> it was done in open court before the judge, and I then think that I would have to make a proffer of consideration, monetary consideration, to bind him. I don't have that opinion of any practicing attorney in the State of Utah. There isn't any attorney I wouldn't stipulate with, but this man I never would.
>
> [Question by Counsel for Respondent:] Well is it your opinion that he should not be permited to practice law in the State of Utah?
>
> A — Yes.

No authority is needed to support the proposition that a member of the bar, as an officer of the Court, should be completely trustworthy and should abide by his commitments. A lawyer whose word cannot be relied upon would be a menace to the process of justice. A person who lacks the quality of trustworthiness cannot be deemed fit to practice law.

Petitioner's Brief attempts to excuse the stipulation incident by the fact that he "acted through counsel" in seeking to dishonor his commitment. This gives cause for wondering what other types of conduct would be permissible in Petitioner's mind if he himself were granted the right to act as counsel.

Finally, Petitioner seeks to explain away the adverse testimony concerning his unethical business reputation by the surprising and almost ludicrous assertion that "only" those people who have suffered financially in their business dealings with Petitioner think he is unethical. The witnesses who testified on Petitioner's behalf were individuals who had not been involved in significant and complex business transactions with him, they were close personal friends, or they were attorneys who had not been involved in litigation with him. Their affirmative statements were not regarded by Respondent or the Supreme Court of

Utah as sufficient to establish good moral character and fitness in the light of the other substantial evidence in the record.

POINT IV

THERE IS NO EVIDENCE OF DISCRIMINATION.

The assertion that Respondent discriminated against Petitioner on the basis of his religion was first raised in the Petition in this court. Since this assertion touches on the integrity of the State Board of Bar Commissioners, it must be dealt with here even though on other grounds this Court could not consider such an untimely argument.

The question of discrimination appears to exist only in the mind of appellate counsel since it was not raised in the exceptions to Respondent's findings nor in the appeal to the Supreme Court of Utah.

It is not at all surprising that the Petitioner has not raised this issue below because all of the testimony of his religious activity was brought into the record by his *own* witnesses who testified affirmatively of Petitioner's activities in his religious community (see, e.g., Transcript, p. 18). Respondent made no negative finding concerning such activities and there is nothing in the record supporting Petitioner's unfortunate insinuation. A Petitioner who produces witneses on his own behalf to establish religious activity in his church and thus appeal to the Bar and Supreme Court of a state, that proudly claims a member of that religion as one of its greatest governors,[4] cannot in good grace now claim his own strategy has aroused religious prejudice. This is particularly so when Respondent did nothing more than find as Petitioner had asserted.

---

[4] Governor Simon Bamberger.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX I

RULE X

THE BAR EXAMINATION

SECTION 10-1. Every "student applicant" must, after meeting the requirements of Rules V, VI, VII, VIII and IX hereof, successfully pass an examination, known as the Bar Examination, which shall be conducted either by the Board, or by a committee appointed by and acting under the supervision and direction of the Board, each year beginning on the first Wednesday in September, or at such other time or times as the Board may determine.

SECTION 10-2. The examination may be wholly written, or partly written and partly oral, in the discretion of the Board or examining committee, and shall consist of such questions as the Board or examining committee may select relating to law, use of law books, legal ethics and legal history.

SECTION 10-3. Any applicant who fails to pass two bar examinations shall be ineligible to take a third examination until one examination has intervened after the second failure. Any applicant who fails to pass the third examination will be re-examined only by special permission of the Board.

SECTION 10-4. Any applicant who fails to pass the Bar Examination and desires to take a subsequent examination need not file the Application for Admission to the Bar as provided in Rule VI hereof.

SUPR
FILED
MICHAEL RODAK, JR., CLERK

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PETITIONER'S REPLY MEMORANDUM

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TABLE OF CASES

	PAGE
Papachristou v. City of Jacksonville, 405 U.S. 156, 40 L.W. 4216 (1972)	2
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	2
Skouser v. Smith, —— Utah 2d —— 493 P.2d 1003 (1972)	4
United Factors v. T. C. Associates, Inc., 21 Utah 2d 351, ——, 445 P. 2d 766, 768	2
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963)	2

Other Authority

Rule IX, as amended, Sec. 9-1 of the Bar Rules	3, 4

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PETITIONER'S REPLY MEMORANDUM

We respond herein only to the more blatant inaccuracies in Respondent's brief.

1. Respondent makes much of the fact that an applicant who fails to pass the third examination may be reexamined only by its special permission. That is entirely irrelevant here, since this question was ruled moot below by the Board and no determination made denying such permission. (See Petition, pp. 8a-9a). Contrary to Respondent's footnote 1 at page 4, Petitioner had indeed noted prior failure in Bar examinations (Petition, p. 6). But this is entirely unrelated to the question of Petitioner's moral character and the constitutionality of the standards used to determine it.